No. 90-360 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC., PETITIONER

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

JOHN G. ROBERTS, JR.
Acting Solicitor General

RICHARD B. STEWART
Assistant Attorney General

PETER R. STEENLAND, JR.
JOHN BRYSON
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM C. PARLER
General Counsel

JOHN F. CORDES, JR.
Solicitor

E. LEO SLAGGIE
Special Counsel

SUSAN FONNER
Attorney
United States Nuclear Regulatory Commission
Washington, D.C. 20555

QUESTIONS PRESENTED

1. Whether the legality of a Nuclear Regulatory Commission policy statement may be challenged in court years after the statement's promulgation because the agency has issued minor amendments to the statement.

2. Whether the court of appeals should have deferred to the Commission's interpretation of Section 306 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10226, as permitting the promulgation of policy guidance, rather than formal rules, regarding the training of power plant personnel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous: Page

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-360

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC., PETITIONER

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 901 F.2d 147. The orders of the court of appeals denying petitions for rehearing and suggestions for rehearing en banc (Pet. App. 24a, 25a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1990. Petitions for rehearing were denied on June 15, 1990 (Pet. App. 24a). The petition for a writ of certiorari was filed on August 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 306 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10226, provides that the Nuclear Regulatory Commission "is authorized and directed to promulgate regulations, or other appropriate Commission regulatory guidance" concerning the training and qualifications of civilian nuclear power-plant operating personnel, and that such regulations or guidance shall establish "instructional requirements" for the personnel training programs of civilian nuclear power plant licensees.

To implement Section 306, the Commission in 1985 issued a policy statement providing regulatory guidance for the training and qualifications of nuclear power plant personnel. 50 Fed. Reg. 11,147 (1985); Pet. App. 27a-34a. In its policy statement, the Commission announced that "regulatory guidance" satisfied "the mandate of the Nuclear Waste Policy Act," and that it was "deferring rulemaking" on training and qualifications for a minimum of two years to afford the nuclear utility industry an opportunity to achieve the goals of Section 306 without regulations (Pet. App. 28a-29a). The policy statement endorsed the training accreditation program developed by the Institute of Nuclear Power Operations (INPO), an industry group established to assist utilities in improving the quality of the management and operation of their nuclear facilities (Pet. App. 29a, 30a). In addition, the NRC stated that it would continue to evaluate the utilities' implementation of the program, and identified a number of specific actions that it would take to monitor the accreditation program developed by INPO in order to determine whether further agency action would be appropriate (Pet. App. 31a-32a).

2. More than a year after the promulgation of this policy statement, respondent Public Citizen requested the Commission to "immediately undertake rulemaking [in order] to comply with * * * Section 306 of the Nuclear Waste Policy Act of 1982." 51 Fed. Reg. 17,361 (1986). Without waiting for the agency to rule on the request for rulemaking, Public Citizen filed suit against the NRC. In that suit, the court of appeals ruled that Public Citizen's challenge to the 1985 policy statement was too late under either of the potentially applicable jurisdictional statutes: it was not filed within either the 180-day time limit of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10139(c), or the 60-day limit of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2342(4). Alternatively, the court held that if the suit were deemed a challenge to the Commission's rejection of Public Citizen's petition for rulemaking, it was too early. Accordingly, the case was dismissed. *Public Citizen* v. *NRC*, 845 F.2d 1105 (D.C. Cir. 1988).

On February 2, 1987, the Commission unanimously denied the petition for rulemaking. 52 Fed. Reg. 3121 (1987). The Commission explained that it had determined "that 'guidance' or 'regulatory guidance' do[es] not necessarily mean a mandatory, enforceable regulation, order or license condition." *Id.* at 3125. Public Citizen did not seek judicial review of this denial.

3. In 1988, the Commission issued minor amendments to its policy statement (Pet. App. 35a-39a).[1]

---

[1] The 1988 amendments made three changes in the policy statement: (1) NRC monitoring and review were expanded; (2) the enforcement discretion included in the 1985 policy statement was eliminated; and (3) minor modifications made by the National Academy for Nuclear Training to its ac-

In January 1989, respondents brought this suit against the Commission, again asserting that the Commission had failed to comply with Section 306 by refusing to impose regulations for the training of nuclear power plant personnel. This time, the court of appeals held that the Commission's decision in 1988 to issue amendments to its policy statement and to keep the policy statement in force started anew the time for judicial review, on the theory that the 1988 decision implicitly "raise[d] the lawfulness" of the original determination to issue a policy statement (Pet. App. 9a).

On the merits, the court of appeals concluded that the issuance of the 1985 policy statement did not satisfy the Commission's obligations under Section 306. The court acknowledged that the statute allowed the NRC "to promulgate regulations, *or* other appropriate Commission regulatory guidance." 42 U.S.C. 10226 (emphasis added). The court concluded, however, that other portions of the statute, particularly the direction to "establish . . . instructional requirements," showed that Congress wanted the Commission to issue binding rules (Pet. App. 12a-22a). The court also held (Pet. App. 13a, 23a) that the statute was so clear that it precluded consideration of the agency's contrary view, citing *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). The court accordingly ordered the agency "to create mandatory requirements" (Pet. App. 23a).

4. The court of appeals denied petitions for re-

---

creditation program were incorporated. The statement accompanying the 1988 amendments reflected the Commission's conclusion "that the [INPO training accreditation] program is effective in ensuring that personnel have qualifications commensurate with the performance requirements of their jobs" (Pet. App. 38a, 39a).

hearing and suggestions for rehearing en banc filed by the Commission and by petitioner, the intervenor below. Pet. App. 24a-26a. Judge Williams, joined by Judges Silberman, D. H. Ginsburg, and Sentelle, concurred in the denial of the suggestions for rehearing en banc, but specifically disagreed with the panel's decision on the merits. He stated that the decision had "completely shorn" Section 306 of its disjunctive statutory language directing issuance of regulations *or* regulatory guidance. Pet. App. 26a. He explained that he did not call for rehearing en banc because "the statute appears unique" and "perhaps more important, it seems * * * not beyond the reach of agency expertise to devise 'regulations' that preserve most if not all of the flexibility the Commission sought and, correctly * * *, believes lawful." *Ibid.*

DISCUSSION

We agree with petitioner that the court of appeals' view of its power to consider a challenge to a four-year old NRC policy statement is incorrect, and defeated reasonable expectations of stability in this regulatory process. We also fully endorse petitioner's argument that the decision below incorrectly interpreted Section 306, and misconstrued *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 843, by failing to give deference to a reasonable statutory construction by the agency to which Congress has delegated the responsibility for administering this statute. The federal respondents did not file their own petition because the Commission expects to follow Judge Williams' suggestion and "devise 'regulations' that preserve most if not all of the flexibility" the Commission sought in its policy statement. Pet. App. 26a. The fact remains, however, that the court of appeals

has erroneously required the NRC to intrude on a highly effective, industry-developed program by promulgating binding regulations that the Commission believes are neither necessary as a matter of policy nor required by law. Therefore, the federal respondents do not oppose certiorari.

1. The court of appeals' determination that it had subject matter jurisdiction in this case was incorrect. The court of appeals itself has held repeatedly that, with rare exceptions, an attack on the validity of agency action must be made within the statutory review period. See, *e.g.*, *Massachusetts* v. *ICC*, 893 F.2d 1368 (D.C. Cir. 1990); *American Iron & Steel Inst.* v. *EPA*, 886 F.2d 390 (D.C. Cir. 1989); *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612 (D.C. Cir. 1988); *National Rifle Ass'n* v. *Federal Election Comm'n*, 854 F.2d 1330 (D.C. Cir. 1988). Here, the statutory review period for a complaint alleging that the NRC failed to implement Section 306 is established by one of two potentially applicable jurisdictional statutes: the Nuclear Waste Policy Act of 1982, which contains a 180-day time limit (42 U.S.C. 10139(c)), or the Hobbs Administrative Orders Review Act, which contains a 60-day limit (28 U.S.C. 2342(4)). Both of those time limits had long since expired when the complaint in this case was filed. *Public Citizen* v. *NRC*, 845 F.2d 1105 (D.C. Cir. 1988).

To overcome this obstacle, the court of appeals found that "the Commission's 1985 action represented a temporary decision not to engage in rulemaking on mandatory training standards, and that the 1988 action reexamined this choice and made it permanent" (Pet. App. 7a). This was an incorrect reading of the Commission's action. In March 1985, in direct response to a congressional directive to issue regula-

tions or regulatory guidance implementing Section 306, the NRC adopted the policy statement attacked below. The court of appeals previously found that announcement sufficiently definitive and final to trigger the running of the limitations period. *Public Citizen* v. *NRC*, 845 F.2d at 1108. In our view, the court was correct in its first decision, rather than its second.

Nor did the agency reopen the basic issue in 1988. At that time, the NRC simply issued three minor amendments to its 1985 policy statement (see note 1, *supra*). While the NRC did, at the same time, observe that its original regulatory choice had proved effective, it did not even obliquely reconsider the policy statement's lawfulness. The court of appeals has chosen to disbelieve the agency and to read far more into the agency's statements than is there.[2]

2. The court of appeals' decision on the merits is also incorrect. It runs counter to established doctrines of statutory construction and principles governing judicial review of an agency's interpretation

---

[2] The court relied on agencies' "everpresent duty to insure that their actions are lawful" (Pet. App. 9a). But if this duty suffices to permit challenges to established policies, it would eliminate statutory review periods altogether. The court also suggested in passing (*ibid.*) that a claim challenging agency action as violative of a statute may be raised after a statutory limitations period has expired by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition in court. Whether or not this avenue for avoiding limitations periods is available to litigants, respondent Public Citizen filed just such a petition with the NRC in 1986, but did not seek timely judicial review of its denial. *Public Citizen* v. *NRC*, 845 F.2d 1105 (D.C. Cir. 1988). The court of appeals did not explain why Public Citizen should have a second chance.

of its statutory mandates. The court read Section 306 to require the Commission to promulgate regulations (Pet. App. 22a). But the operative words of the statutory provision direct the Commission "to promulgate regulations, *or* other appropriate Commission regulatory guidance" (42 U.S.C. 10226 (emphasis added)). This disjunctive phrasing indicates clearly that Congress contemplated alternative approaches, and authorized the Commission to adopt an approach other than issuing regulations. The court of appeals' interpretation—by mandating binding rules—makes the phrase "other appropriate Commission regulatory *guidance*" entirely meaningless.[3] (Emphasis added.) This is contrary to the two well-established principles of statutory construction that (1) statutory language must be held to mean what it plainly expresses (the so-called "plain meaning" rule), and (2) all of the language of a statute must be given effect. See 2A N. Singer, *Sutherland Statutory Construction* §§ 46.01, 46.06 (Sands 4th ed. Supp. 1990).

It is true, as the court of appeals stressed, that Section 306 says that the "regulations" or "regulatory guidance" must "establish * * * instructional requirements," but the court was wrong in concluding that the Commission's "guidance" approach is incompatible with the "requirements" directive. In fact, the policy statement does establish "requirements": it sets forth "essential elements" for an acceptable training pro-

---

[3] The court of appeals rejected any interpretation of Section 306 that would permit the NRC to take any action—such as the case-by-case imposition of requirements on particular licensees—short of the issuance of regulations (Pet. App. 22a).

gram.[4] The statement is backed by vigorous Commission oversight of licensee activities and an enforcement policy leading to enforceable orders or license conditions where training or qualifications deficiencies exist. In light of the relationship between the Commission and the regulated industry, this scheme certainly creates "requirements" in any practical sense. Indeed, the court of appeals itself in a previous case characterized similar guidance in a regulatory agency's policy statement as "requirements." *Guardian Fed. Sav. & Loan Ass'n* v. *FSLIC*, 589 F.2d 658, 667 (D.C. Cir. 1978).

The court of appeals' decision entirely ignores the Commission's frequent and longstanding practice of issuing "[r]egulatory [g]uides," not binding in themselves, to the nuclear industry. See *Porter County Chapter of the Isaac Walton League* v. *AEC*, 533 F.2d 1011, 1016 n.5 (7th Cir.), cert. denied, 429 U.S. 945 (1976). It is difficult to believe that Congress would not have stated that non-binding guidance was impermissible under Section 306, if Congress desired to eliminate it as a possible method of implementing the statute.[5] Instead, as we have

---

[4] The instructional requirements listed in the statement are as follows (Pet. App. 30a):

- Systematic analysis of the jobs to be performed.
- Learning objectives derived from the analysis which describe desired performance after training.
- Training design and implementation based on the learning objectives.
- Evaluation of trainee mastery of the objectives during training.
- Evaluation and revision of the training based on the performance of trained personnel in the job setting.

[5] The court of appeals found support for its view of Section 306 in other statutes requiring agencies to "establish require-

stressed, Congress expressly provided that the NRC could issue "guidance" as an alternative to regulations.

At bottom, the court of appeals imposed its preferred reading of Section 306 on the NRC. Indeed, the court virtually acknowledged as much. It recognized that " 'guidance' certainly can mean, in ordinary parlance, to give advice, or suggestions" (Pet. App. 14a), but viewed the term "requirements" as "clearer" (Pet. App. 16a). This approach to statutory construction is fundamentally at odds with the deference doctrine this Court recognized in *Chevron* —which requires courts to resolve ambiguities in the agency's favor, not to engage in their own *de novo* examination of the statute, so long as the agency's statutory reading is a "permissible" one. 467 U.S. at 843. Accord, *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988). In this case, whatever the merits of the court of appeals' own reading of Section 306, the NRC's contrary reading is, at the least, a "permissible" one.

3. The court of appeals' decision intrudes on a successful training program that has been the subject of lengthy, in-depth deliberation and review by the NRC and the expenditure of considerable resources by the utility industry. Pet. 13 & n.6. In issuing its 1985 policy statement, the Commission de-

---

ments" (Pet. App. 16a-17a). This Court has recently criticized this method of statutory construction: *Tafflin* v. *Levitt*, 110 S. Ct. 792, 797 (1990), explaining that the "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language" (quoting *Lou* v. *Belzberg*, 834 F.2d 730, 737 (9th Cir. 1987)).

liberately chose to issue policy guidance rather than regulations because the nuclear industry had "developed a training accreditation program which the NRC has found to be an acceptable means of industry self-improvement in training" (Pet. App. 28a). In amending the policy statement in 1988, the Commission found that the industry program "is generally an effective program for ensuring that nuclear power plant personnel have qualifications commensurate with the performance requirements of their jobs" (Pet. App. 35a). The NRC remains firmly of the view that the industry accreditation program has been a success and does not warrant direct supervision through NRC regulations.

Nonetheless, although in our view the court of appeals has misread the law, forcing the NRC to devote scarce resources to an area where an existing program is working well, we have not filed our own petition for a writ of certiorari. The agency currently is studying ways to issue regulations on employee training that would disrupt the successful industry initiative to the minimum degree possible, and is hopeful that it will be able to comply with the court's mandate while still preserving most of the policy statement's flexibility. For this reason, the federal respondents have not themselves sought review in this Court. Nevertheless, for the reasons we have outlined, we do not oppose the granting of the instant petition. If the petition is granted, we will participate in the case in support of petitioner.

CONCLUSION

The federal respondents do not oppose the petition for a writ of certiorari.

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

WILLIAM C. PARLER
General Counsel

JOHN F. CORDES, JR.
Solicitor

E. LEO SLAGGIE
Special Counsel

SUSAN FONNER
Attorney
United States Nuclear Regulatory Commission

RICHARD B. STEWART
Assistant Attorney General

PETER R. STEENLAND, JR.
JOHN BRYSON
Attorneys

OCTOBER 1990

---

* The Solicitor General is disqualified in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 282061 20171